

STATE OF MICHIGAN

SUPREME COURT

JULIE NEAL,

Ok

Supreme Court No.

Plaintiff-Appellant^{ee},
~~ant~~

Court of Appeals No: 230494

Open 9/17/02

vs.

Lower Court Case No: 99-968-NO
(Eaton County)

TERRY WILKES,

C. Osterhaven

Defendant-Appellee^{ant}.

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

FILED

OCT - 8 2002

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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APPL

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DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

APPEAL OF JUDGMENT

JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Defendant appeals from the unpublished per curiam Opinion of the Court of Appeals, released September 17, 2002, reversing the September 1, 2000 order of the Eaton County Circuit Court granting Defendant's Motion for Summary Disposition. The Court of Appeals also and remanded this matter to the Circuit Court for further proceedings.

Defendant asks that this Court reverse the decision of the Court of Appeals as to the issue of the applicability of the Recreation Land Use Act, MCL 324.73301, and reinstate the judgment of the Eaton County Circuit Court.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS ERR IN FAILING TO APPLY THE RECREATIONAL LAND USE ACT TO BAR PLAINTIFF'S CLAIMS?

Defendant answers "yes".
Plaintiff answers "no".
The Court of Appeals answered "no".

II. SHOULD THIS COURT APPLY THE PLAIN MEANING RULE TO THE RECREATIONAL LAND USE ACT?

Defendant answers "yes".
Plaintiff would answer "no".
The Court of Appeals did not address this issue.

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STATEMENT OF FACTS

A. Factual History

This is a highly questionable premises liability claim arising out of a July 9, 1998 accident. Plaintiff was riding as a passenger on the back of a four-wheel ATV which was driven by Kim Norman, brother of the Defendant, Terry Wilkes. Mr. Wilkes owned the ATV. Prior to the injury, Norman and Plaintiff were riding in an area where he should not have been driving because the terrain was too dangerous, and Defendant, the land owner, told Norman to get back to pole barn, and put the ATV away. Defendant specifically told Norman that he was not to drive the ATV. (Exhibit 1, Deposition of Terry Wilkes, p. 33-34).

Despite Mr. Wilkes' statement that all rides were done, Plaintiff later asked Kim Norman to take her for another ride. (Exhibit 2, Deposition of Julie Neal, p. 55). Norman took Plaintiff for a ride, and on their way back to the house, Norman drove over some "ripples" on the land. Plaintiff alleges that when Norman drove over the "ripples," she was bounced on the ATV, which caused her back injury. During his deposition, Defendant described the uneven ground as waves, no more than six inches high. (Exhibit 1, Deposition of Terry Wilkes, p. 27). See also, picture attached as exhibit 3.

Plaintiff filed suit against Defendant based on four theories:

1. Defendant was negligent in failing to maintain a safe premises and in failing to warn Plaintiff of the unsafe condition of the land. (Complaint ¶ 14);
2. Defendant negligently entrusted the ATV to an individual who was incompetent; (Complaint ¶ 15);
3. Defendant, as the owner of the ATV, is vicariously liable for Mr. Norman's negligence, which consisted of:
 - a. operating an ATV with a passenger;
 - b. failing to make proper observations of the condition of the property; and
 - c. operating an ATV at a speed too fast for the conditions then existing.

(Complaint ¶ 16).

4. Defendant created or maintained a dangerous condition on the premises which constituted a nuisance. (Complaint ¶ 23).

In light of the fact that Plaintiff's injury occurred on a large tract of land in its relatively natural state, Defendant is entitled to summary disposition under MCL 324.73301; MSA 3A.73301, the Recreational Land Use Act (RUA).

B. Procedural History

On August 5, 1999, Plaintiff filed suit against the Defendant alleging the claims set forth above. On September 24, 1999, the attorneys from Roberts Betz and Bloss, P.C. filed an Appearance, Answer to Plaintiff's Complaint, and Affirmative Defenses on behalf of the Defendant. The attorneys from Roberts Betz and Bloss did not include immunity under the Recreational Land Use Act as an affirmative defense.

On October 4, 1999, the trial court issued a scheduling which provided that all amendments to the pleadings must be filed by January 1, 2000 and that discovery was to be completed by May 1, 2000. However, the Court stated that this order may be amended upon a showing of good cause after a motion or conference call. On March 6, 2000, Defendant changed attorneys and Worsfold Macfarlane McDonald, P.L.L.C., filed a substitution of attorneys. On April 24, 2000, Defendant filed a Motion for Leave to Amend the Affirmative Defenses with Brief in Support. In this motion, Defendant sought to add immunity under the Recreational Land Use Act as an affirmative defense. In conjunction with this motion, Defendant also filed a Motion for Summary Disposition, alleging that Plaintiff's claims were barred as a matter of law under the Recreational Land Use Act, that there was no liability under the Owners' Liability Statute, and that there was no nuisance as a matter of law. Both motions were scheduled to be

heard by the Court on May 19, 2000.

On May 19, 2000, the Court held oral arguments on Defendant's Motion for Leave to Amend the Affirmative Defenses. Defendant argued that leave to amend affirmative defenses should be freely given, and that Defendant should be allowed to add immunity through the Recreational Land Use Act as an affirmative defense. Over Plaintiff's objection, Judge Osterhaven granted Defendant's Motion for Leave to Amend his Affirmative Defenses and **allowed Plaintiff 60 days of additional discovery so that Plaintiff fully research this affirmative defense.** Defendant's Motion for Summary Disposition was not heard at this time.

After the 60 days of discovery, oral arguments on Defendant's Motion for Summary Disposition was heard by Judge Osterhaven on August 18, 2000. The Court determined that there were no genuine issues of material fact and that Defendant was entitled to summary disposition. Specifically, the Court determined that Plaintiff's injury occurred on land in its relatively natural state, and that Defendant was entitled to protection under the Recreational Land Use Act. Orally, Plaintiff sought leave to file an amendment to her pleadings, however, the Court ruled that any gross negligence amendment would be futile in light of the facts which had been developed. Plaintiff's case was dismissed in an order dated September 1, 2000. (Exhibit 4). On September 14, 2000, Plaintiff, through new counsel, filed a Motion for Reconsideration. On October 3, 2000, the Court entered an Order denying Plaintiff's Motion for Reconsideration. (Exhibit 5).

Plaintiff filed a Claim of Appeal on October 23, 2000. Both parties submitted briefs and oral arguments were held before the Court on September 4, 2002. On September 17, 2002, the Court of Appeals issue an unpublished, per curiam decision reversing the order granting summary disposition. (Exhibit 6). In so doing, the Court of Appeals relied on the ruling in

Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987) for the proposition that the recreational land use act was only to be applied “to large tracts of undeveloped land suitable for outdoor recreational uses.”

Defendant now files the instant Application for Leave to Appeal and urges this Court to reverse the Court of Appeals and reinstate the Circuit Court’s judgement.

ARGUMENT

Defendant's Application for Leave to Appeal presents issues involving legal principals of major significance regarding the interpretation of Recreational Land Use Act. First, the Court of Appeals misapplied the case law and misinterpreted the Recreational Land Use Act as Defendant's property is exactly the type of land contemplated in the plain language of the act. As such this Court has the opportunity to reverse the Court of Appeal's incorrect conclusion.

Second, and more importantly, this case provides that Court the opportunity to revisit the plain meaning of the Recreational Land Use Act and rectify the decision made by the Supreme Court in Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987). It is clear from the unambiguous language of the Recreational Land Use Act that the Wymer Court improperly limited the Recreational Land Use Act to urban areas. Defendant's Application for Leave to Appeal is the appropriate vehicle by which this Court can address plain meaning of the Recreational Land Use Act.

I. THE COURT OF APPEALS ERR IN FAILING TO APPLY THE RECREATIONAL LAND USE ACT TO BAR PLAINTIFF'S CLAIMS

The crux of this matter is whether or not Plaintiff's claims are barred by the Recreational Land Use Act (RUA), MCL 324.73301; MSA 3A.73301, which states:

Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

Id.

In Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987), the Michigan Supreme Court analyzed the legislative history behind the RUA and determined:

the Legislature intended the act to apply specifically to certain enumerated outdoor activities (fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling) which, ordinarily, can be accommodated only on tracts of land which are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activities. The commonality among all these enumerated uses is that they generally require large tracts of open, vacant land in a relatively natural state. This fact and the legislative history of the RUA make clear to us that the statute was intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the RUA. The intention of the Legislature to limit owner liability derives from the impracticability of keeping certain tracts of lands safe for public use. The same need to limit owner liability does not arise in the case of recreational facilities which, in contrast, are relatively easy to supervise and monitor for safety hazards.

Id. at 79.

In Wilson v Thomas L. McNamara, 173 Mich App 372; 433 NW2d 851 (1988), the Court stated:

the act was designed to limit owner liability on large tracts of undeveloped land which are suitable for outdoor recreational use and are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activities.

The focus is on the use of the land and whether it remains in a relatively natural state or has been developed and changed in a manner incompatible with the intention of the act. . . . The central issue in this case is the character of the land.

Id. at 377.

In Wilson, supra, the plaintiff's son drowned in a man made pond which was located on a large tract of undeveloped land. The Court ruled that because the injury occurred in an area which was not in its natural state, but rather was changed in character, the plaintiff was allowed to maintain a cause of action against the landowner. Id. at 378.

According to MCL 324.73301 and its interpreting case law, it is clear that Plaintiff may not bring a cause of action if her injury occurred:

- 1) on the land of another without payment by the Plaintiff to the owner;
- 2) for motorcycling or any other outdoor recreational use or trail use; and
- 3) the injury occurred on land which is in its relatively natural state.

See, Wilson v Thomas L. McNamara, Inc., 173 Mich App 372; 433 NW2d 851 (1988).

In this case, there is no question that Plaintiff did not pay Mr. Wilkes for the use of his land. There is also no question that the riding of the ATV will constitute motorcycling or other recreational or trail use. Therefore, Defendant will satisfy the first two elements of the RUA.

The real question is whether Plaintiff's injury occurred on a tract of land which was in its relatively natural state. In Ellsworth v Highland Lakes Development, 198 Mich App 55; 498 NW2d 5 (1993), the Court stated that:

The mere presence of homes near a large, undeveloped tract of land does not make the land "suburban." A suburb is "an outlying part of a city or town; a smaller place adjacent to or sometimes within commuting distance of a city; the residential area on the outskirts of any city or large town." Webster's Third New International Dictionary, Unabridged Edition (1965). Defendant's land is neither a "residential area" nor "an outlying part of a city or town."

Id. at 60 (footnotes omitted).

The court also stated that the land was not considered developed just because motorcyclists and others had worn a path on the land. Id. The RUA "is not rendered inapplicable because some human activity occurs on the land." Id.

According to the holding in Ellsworth, supra, the mere presence of a home near a large, undeveloped tract of land does not make the land developed. As such, the fact that the injury occurred near Mr. Wilkes' home will not necessarily make the RUA inapplicable. Under

Ellsworth, supra, it is clear that just because the injury may have occurred on a worn path, the land is not necessarily considered developed. It is clear from Plaintiff's testimony that the injury occurred near the woods, on land which was in its relatively natural state. (Exhibit 2, Deposition of Julie Neil, p. 64).

The Court of Appeals, in citing to the Supreme Court decision in Wymer v Holmes, 429 Mich 66; 412 NW2d 213 (1987), stated:

the statute has been construed to apply "to apply to large tracts of undeveloped land suitable for outdoor recreational uses," not to "[u]rban, suburban, and subdivided lands

(Exhibit 6).

However, the injury occurred on an eleven acre plot of land which was owned by Terry Wilkes. (See Exhibit 7, Certified Boundary Survey of the property). Arthur A. St. Clair, the supervisor for the Charter Township of Windsor, where Defendant's land lies, stated in his affidavit that Plaintiff's land is in "an area of large parcels of land which are generally under developed or of very low density." (Exhibit 8). Mr. St. Clair also stated that he would not consider Mr. Wilkes property to be significantly developed. (Exhibit 8).

According to the photographs and testimony, Plaintiff's injury took place on land in its relatively natural state. (See Exhibit 3, pictures of Defendant's property). The specific area where the injury occurred was mowed once every three weeks. (Exhibit 9, Affidavit of Terry Wilkes). However, mowing the lawn did not alter the character of the land. Because Plaintiff's injuries occurred on land in its relatively natural state, the Recreational Land Use Act applies and Plaintiff's claims are barred as a matter of law. In this matter, it is clear that Plaintiff's injury occurred on land which was in its relatively natural state. As such, the Court of Appeals failed to

properly apply the RUA to this case.

II. This Court Should Overturn the Wymer decision as the Wymer Court Failed to Apply the Plain Meaning Rule to the Recreational Land Use Act.

Although stare decisis is generally the preferred course, it “should not be applied mechanically to prevent this Court from overruling erroneous decisions regarding the meaning of a statute.” Pohutski v City of Allen Park, 465 Mich 675, 693-94;641 NW2d 219 (2002). In making its decision, the Wymer Court improperly ignored the plain language of the RUA, created ambiguity where none existed, and speculated as to the intent of the RUA. This Court now has the chance to overturn Wymer, supra.

In Pohutski, supra, this Court stated:

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000); *Massey v. Mandell*, 462 Mich. 375, 379-380, 614 N.W.2d 70(2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v. Auto Club Ins. Ass'n*, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402, 605 N.W.2d 300. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v. Lansing Twp.*, 356 Mich. 641, 649-650, 97 N.W.2d 804 (1959).

Pohutski, 465 Mich at 683.

This is exactly the approach which was taken by the Court of Appeals in Winiecki v Wolf, 147 Mich App 742; 383 NW2d 119 (1986). In Winiecki, the court was asked whether the RUA applied when the injury occurred during a family reunion game which took place in the defendant's backyard. In applying the plain meaning rule, the Court stated:

This statute, as the trial court has already observed, is clear and unambiguous. Plaintiff was a person on the lands of another, without paying a consideration, for the purpose of an outdoor recreational use. The statute offers nothing on its face excluding from its application the backyard of residential property. If the Legislature did not intend the statute to apply to parcels of land this size, it was within its power to insert words limiting the statute's application, *e.g.*, to lands in their natural state. As we, however, are constrained to apply the statute as written, we cannot say that the trial court erred in relieving defendants of liability based on the recreational use statute.

Id. at 745.

As the Winiecki Court held, the plain language of the RUA is clear and unambiguous on its face. As such, there was no reason for the Wymer Court to interpret what the legislature meant in enacting the statute. If the legislature had intended to limit the applicability of the act to large tracts of urban land, the legislature could have easily done so. However, the plain language of the RUA makes no such limitation. This case provides this Court to correct the Wymer decision by applying the plain meaning rule as was done in Pohutski, supra.

The Wymer Court's misapplication of the plain meaning rule affects any owner of large plots of land which is suitable for recreational activities which may be in a suburban area. There is nothing in the plain language of the RUA which excludes property like the property owned by the Defendant. With more and more people moving to the outskirts of cities so that they can have more land, a plain meaning interpretation of the RUA is important. As such, the Defendant respectfully requests that this Court accept leave to appeal.

Relief Requested

Defendant-Appellant respectfully requests that this Court grant Defendant's leave to appeal. In the alternative, Defendant respectfully requests that this Court reverse the Court of Appeals and reinstate the judgement of the trial court.

Dated: 10-7-02

Worsfold Macfarlane McDonald, P.L.L.C.

A handwritten signature in black ink, appearing to read "David M. Pierangel", is written over a horizontal line.

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